



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A

THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY

This is the **summative (formal) assessment** for **Module 2A** of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from **Module 2**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 2A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student ID.assessment2A]**. An example would be something along the following lines: 202223-336.assessment2A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 2A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 2A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

ANSWER ALL THE QUESTIONS

Please note that all references to the “MLCBI” or “Model Law” in this assessment are references to the Model Law on Cross-Border Insolvency.

QUESTION 1 (multiple-choice questions) [10 marks in total] 6 marks

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which one of the following international organisations' mandate is to further the progressive harmonization of the law of international trade?

- (a) World Trade Organization.
- (b) The United Nations Commission on International Trade Law.**
- (c) The United Nations Conference on Trade and Development.

Question 1.2

Which trend(s) and process(es) served as a proximate cause for the development MLCBI?

- (i) Rise of corporations.
- (ii) Internationalisation.
- (iii) Globalization.
- (iv) Universalism.
- (v) Territorialism.
- (vi) Technological advances.

Choose the correct answer:

- (a) Options (i), (ii), (iii), (iv) and (vi).
- (b) Options (i), (ii), (iii) and (iv).**
- (c) Options (ii), (iii), (iv) and (vi).
- (d) All of the above.

Question 1.3

Which of the following statements incorrectly describe the MLCBI?

- (i) It is legislation that imposes a mandatory reciprocity on the participating members.
- (ii) It is a legislative text that serves as a recommendation for incorporation in national laws.
- (iii) It is intended to substantively unify the insolvency laws of the foreign nations.
- (iv) It is a treaty that is binding on the participating members.

Choose the correct answer:

- (a) Options (ii), (iii) and (iv).
- (b) Options (i), (ii) and (iv).
- (c) Options (i), (iii) and (iv).**
- (d) All of the above are incorrect.

Question 1.4

Which of the below options reflect the objectives of the MLCBI?

- (i) To provide greater legal certainty for trade and investment.
- (ii) To provide protection and maximization of value of the debtor's assets.
- (iii) To provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtors.
- (iv) To facilitate the rescue of financial troubled businesses.
- (v) To ensure substantive unification of insolvency laws of member-states.

Choose the correct answer:

- (a) Options (i), (ii), (iii) and (iv).
- (b) Options (ii), (iii) and (v).**
- (c) Options (ii), (iv) and (v).
- (d) None of the above.

Question 1.5

Which two of the below hypotheticals demonstrate a more likely precursor to a "cross-border insolvency"?

- (i) An insolvency proceeding is commenced in jurisdiction A, but a significant asset is located outside of jurisdiction A.
- (ii) An insolvency proceeding is commenced in jurisdiction A and immediately transferred to a foreign jurisdiction B.
- (iii) An insolvency proceeding is commenced in jurisdiction A, in which a group of affiliated debtors has its COMI as well as all assets and liabilities.
- (iv) An insolvency proceeding is commenced in jurisdiction A, but certain liabilities are governed by laws of a foreign jurisdiction B.
- (v) An insolvency proceeding is commenced in jurisdiction A, but all *de minimis* assets are located in foreign jurisdictions.

Choose the correct answer:

- (a) Options (i) and (ii).
- (b) Options (ii) and (iii).
- (c) Options (iii) and (v).
- (d) Options (i) and (v).**

Question 1.6

A restructuring proceeding is commenced in jurisdiction A by a corporation with COMI in jurisdiction A and an overleveraged balance sheet. The court in jurisdiction A, overseeing the restructuring, entered a final and non-appealable order, approving the compromise and restructuring of the debt. The entered order, by its express terms, has a universal effect. Based on these facts alone, what is the **effect** of such order's terms in jurisdiction B if jurisdictions A and B do **not** have a bilateral agreement?

- (a) Binding within jurisdiction B.
- (b) Binding within jurisdiction B, but certain actions need to be taken.
- (c) No effect within jurisdiction B.**
- (d) Likely no effect within jurisdiction B.**
- (e) Not enough facts provided to arrive at a conclusion.

Question 1.7

Which of the following statements set out the reasons for the development of the Model Law?

- (i) The increased risk of fraud by concealing assets in foreign jurisdictions.
- (ii) The difficulty of agreeing multilateral treaties dealing with insolvency law.

- (iii) To eradicate the use of comity.
- (iv) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

Choose the correct answer:

- (a) Options (i), (ii) and (iii).
- (b) Options (i), (ii) and (iv).**
- (c) Options (ii), (iii) and (iv).
- (d) All of the above.

Question 1.8

Which of the statements below are incorrect regarding COMI under the MLCBI?

- (i) COMI is a well-defined term in the MLCBI.
- (ii) COMI stands for comity.
- (iii) The debtor's registered office is irrelevant for purposes of determining COMI.
- (iv) COMI is being tested as of the date of the petition for recognition.

Choose the correct answer:

- (a) Options (i), (ii) and (iii).**
- (b) Options (ii), (iii) and (iv).
- (c) All of the above.
- (d) None of the above.

Question 1.9

In the event of the following concurrent proceedings, indicate the order of the proceedings in terms of their hierarchy / primacy:

- (i) Foreign main proceeding.
- (ii) Foreign non-main proceeding.
- (iii) Plenary domestic insolvency proceeding.

Choose the correct answer:

- (a) Options (ii), (i) and then (iii).
- (b) Options (i), (ii) and then (iii).**

(c) Options (iii), (i) and then (ii).

(d) Options (iii), (ii) and then (i).

Question 1.10

Which of the statements below are correct under the MLCBI?

- (a) The foreign representative always has the powers to bring avoidance actions.
- (b) The hotchpot rule prioritises local creditors.
- (c) The recognition of a foreign main proceeding is an absolute proof that the debtor is insolvent.

(d) None of the above are correct.

QUESTION 2 (direct questions) [10 marks in total] 8 marks

Question 2.1 [maximum 3 marks] 2 marks

What is the key distinction between the application of the MLCBI and the European Union (EU) Regulation on insolvency proceedings? Also describe one key benefit and disadvantage of each approach.

The key distinction between the application of the MLCBI and the EU Regulation on insolvency proceedings lies primarily in the jurisdictional reach and the flexibility they provide. MLCBI was created by UNICITRAL to provide a framework that can be used on a global scale. MLCBI is not bound strictly within the EU (?), and can be adopted by any country wishing to streamline and provide harmonization relating to cross-border insolvency issues. Due to the fact that it is a non-binding framework that must be adopted by the country if they choose to do so, can limit the effectiveness of the framework as it only applies to countries that have adopted the MLCBI framework.

EU Regulation is a binding framework that all EU member states must follow and is not enforceable outside of the EU. The EU Regulations were put into place in order to provide harmonization and efficiencies within the EU when it comes to cross-border insolvency issues as it is one set of rules that all EU member states must follow. Due to the limiting nature of the EU Regulation as it is not a global framework, it can cause inefficiencies if there are cross-border insolvency issues outside of the EU. The EU Regulations cannot be adopted by states outside of the EU (incorrect), and therefore is limiting in a global context.

While it is correct to say that EIR is not enforceable outside EU, any Nation can take/emulate it within its national framework (nonetheless not necessarily reciprocal/recognized by EU) in other words, EU law is not exclusive for the EU members.

Question 2.2 [maximum 2 marks] 2 marks

Explain what the court should primarily consider using its discretionary power to grant post-recognition relief under Article 21 of the MLCBI.

There are numerous factors that the court should consider when using its discretionary powers to grant post-recognition relief under Article 21 of the MLCBI. Firstly, if the court grants post-recognition relief under Article 21 of the MLCBI, it should ensure that it continues to protect the creditors' rights and interests and that it does not harm the rights and interests of creditors. The court should also consider whether granting post-recognition relief will provide further efficiencies within the insolvency proceedings, or if it will create inefficiencies within the proceedings that may harm those involved. The court should also consider whether granting post-recognition relief is fair and protects all parties involved and does not disadvantage any of the parties involved in the proceedings. Lastly, the court must ensure that if post-recognition relief is granted, it is in compliance with all legal requirements that should be considered within the insolvency proceedings.

Question 2.3 [2 marks] 2 marks

Explain the protections granted to creditors in a foreign proceeding under Article 13 of the MLCBI.

Article 13 of the MLCBI provides foreign creditors with the same rights as creditors within the enacting state and states that foreign creditor claims cannot be ranked lower than unsecured creditor claims because they come from a foreign jurisdiction. Article 13 provides protection to foreign creditors and ensures their rights and interests are protected and not treated differently than claims made locally.

Question 2.4 [maximum 3 marks] 2 marks

What is a key distinction with respect to the relief available in foreign main versus foreign non-main proceedings?

The key distinction between foreign main and foreign non-main proceedings relates to the level of automatic stay granted to protect the debtor's assets and the administration of insolvency proceedings. In foreign main proceedings, which takes place in the debtor's COMI, the automatic stay under Article 20 is comprehensive and applies to all proceedings against the debtor and their assets. It provides a global freeze on all creditor enforcement actions and proceedings. The automatic stay protects the debtor's estate from actions taken by the creditor when the insolvency proceedings are taking place.

Foreign non-main proceedings occur outside of the debtor's COMI and would be subject to Article 21 under the Model Law. The stay is much more limited than a foreign main proceeding. The stay that a foreign non-main proceeding only applies to actions taken within the jurisdiction the automatic stay is granted and only protects the assets within that jurisdiction.

FNMP relief is discretionary in nature

QUESTION 3 (essay-type questions) [15 marks in total] 7 marks

Question 3.1 [maximum 4 marks] 2 marks

A debtor has its COMI in Germany and an establishment in Bermuda, and both foreign main and foreign non-main proceedings as well as the recognition proceedings in the US have

been opened. In this scenario, explain where the foreign proceedings must have been filed, and the likely result.

The foreign main proceedings would have been opened in Germany as that is the debtor's COMI and the foreign non-main proceedings would have been opened in Bermuda, as it is not the COMI of the debtor, but the debtor has an establishment in Bermuda. In order to receive recognition in the US, both the foreign main and non-main proceedings would need to be recognized in the US in order to protect the assets of the debtor in the US. By received recognition in the US, the foreign court appointed officials in Germany would be able to ensure that the value of the assets held within the US are protected and would give the foreign court appointed officials the power to oversee the assets. With all of these proceedings in place, the appointed officials in Germany would be able to oversee the debtors estate and ensure there is consistency within the insolvency proceedings and provide additional efficiencies to ensure that a smooth insolvency process can occur.

Essay requires references to definitional and procedural provisions of MLCBI eg. Art. 2, 15, 17, 6..

Question 3.2 [maximum 3 marks] 2 marks

Joint provisional liquidators commenced a recognition proceeding in the US and immediately were sued and served with discovery in connection with their alleged tortious interference with contract rights of the US-based vendors of the foreign debtor. Explain the likely outcome.

The recognition proceeding and the lawsuit for tortious interference with contract rights would run as separate actions. The recognition proceeding in the US is to gain formal recognition of a foreign proceeding in the US to ensure the rights of creditors are protected and protect the assets of the debtor to ensure the estate is preserved. In regards to the lawsuit for tortious interference, the joint provisional liquidators will need to ensure they have legal counsel to advise them on the matter and present the evidence and information they have to defend against the lawsuit. As these are two separate actions, they would not affect each other. Immediate relief should be sought after by the joint provisional liquidators under Article 19 to ensure that the assets of the company are protected until a decision has been made regarding the recognition application. Once a decision has been made, the joint provisional liquidator may want to find relief under Article 21 to ensure that the assets cannot be sold or interfered with in the US and that the liquidator can supervise the assets to ensure there is no leakage in value regarding the debtors estate.

Requires reference to Art.10 MLCBI

Question 3.3 [maximum 4 marks] 2 marks

A foreign representative who administers assets in a debtor-in-possession-like restructuring proceeding in the UK commences a recognition proceeding in the US, setting the recognition hearing 35 days after the petition date due to the availability of the court. There is no litigation pending or threatened against the foreign debtor, but US-governed leases and intellectual property licenses have *ipso facto* clauses (that is, bankruptcy-triggered terminations) that are not enforceable under the US Bankruptcy Code. Based on these facts,

explain what steps, if any, should the foreign representative take to protect the assets and why?

The foreign representative should seek for an immediate stay to ensure that the ipso facto clauses cannot be enforced upon and that the assets are protected under Article 19 until a decision on the recognition proceeding has been made. Additionally, the foreign representative should notify the US parties that the debtor has contracts with regarding the intellectual property and leases and negotiate with them and seek a waiver to prevent any terminations that may be triggered due to the restructuring proceedings. Additionally, further relief can be obtained under Article 21 to ensure the debtors estate is protected and cannot be interfered with after recognition has been received. Additionally, legal counsel should be engaged to receive guidance on how to appropriately navigate the recognition proceedings and what further steps can be taken in order to ensure that the ipso facto clauses are not triggered. An immediate temporary stay under Article 19 or a waiver should be acquired prior to the hearing taken place to ensure the assets are protected and not stripped away.

Requires substantive discussion based upon Art.19 MLCBI and its definitions, as well as references to the provisions of Art 20 and 21 MLCBI as applicable. (references to Art. 19 and 21 are noted)

Question 3.4 [maximum 4 marks] 1 mark

A foreign representative, who administers the assets of an insolvent debtor in an insolvency proceeding pending in Country A (where the foreign debtor has its registered office and not much more), commenced a proceeding in Country B to recognise the foreign proceeding as the foreign main proceeding in order to sell certain assets within the territorial jurisdiction of Country B, but unfortunately the insolvency court considering the petition for recognition denied the recognition of the foreign proceeding as a foreign main proceeding. Explain what may or should the foreign representative do next? What should the foreign representative have done at the outset?

The foreign representative can look to file an appeal with either the same court or the higher court in Country B. The foreign representative should compile all evidence and documentation on why they believe Country B should be considered for a foreign main proceeding. Before filing the appeal, the foreign representative should engage local legal counsel in Country B to ensure that an appeal would be advisable in order to preserve the debtors estate. If an appeal is not advisable, the foreign representative could look to seek recognition as a foreign non-main proceeding in order to preserve the assets of the debtor. Relief should be sought under Article 19 of the Model Law to ensure no leakage of asset value of the debtor from the time the recognition application is submitted. At the outset, the foreign representative should have assessed the situation further, hired local legal counsel to seek advise on what type of recognition proceeding should have been filed, or whether there were other applicable laws in Country B in order to appropriately receive recognition in Country B. The foreign representative should have initially filed a foreign non-main proceeding in Country B as the COMI of the debtor was in Country A (considering the registered office and books and records are held there), which is the criteria to file a foreign main proceeding. This is likely why the court denied the recognition of a foreign main proceeding in Country B.

Art.16 MLCBI is the main reference for “rebuttable COMI presumption”. References to Art.17, 21, 6 are also required

QUESTION 4 (fact-based application-type question) [15 marks in total] 10 marks

Assume you received a file for a new client of the firm. The file contains the facts described below. Based on these facts, analyse key filing strategy to ensure a successful restructuring - specifically, whether to apply for recognition of main or nonmain proceeding or both (in light of COMI / establishment analysis), what papers need to be submitted, and what relief should be requested on day one of the filing.

The client is a Cayman Islands incorporated and registered entity. It is a financial service holding company for a number of direct and indirect subsidiaries that operate in the commercial automobile insurance sector in the United States. Globe Holdings was initially formed as a Canadian company in 2009, under the laws of Ontario, Canada. A year later, following certain reverse merger transactions, it filed a Certificate of Registration by Way of Continuation in the Cayman Islands to re-domesticate as a Cayman Islands company and changed its name to Globe Financial Holdings Inc. When it re-incorporated in the Cayman Islands in 2010 (from Canada), Globe Holdings provided various notices of its re-incorporation, including in the public filings with the Securities and Exchange Commission (SEC). Around that time, Globe Holdings retained its Cayman Islands counsel Cedar and Woods, which has regularly represented Globe Holdings for over a decade. Globe Holdings has a bank account (opened just a few days ago) in the Cayman Islands from which it pays certain of its operating expenses. Globe Holdings often holds its board meetings virtually, and not physically in the Cayman Islands, and, having obtained support for a bond restructuring, all its regular and special board meetings have been organized by its local Cayman counsel virtually. The client also maintains its books and records in the Cayman Islands. Its public filings with the SEC as well as the prospectus provided in connection with the issuance of the Notes disclosed that Globe Holdings is a Cayman Islands company and explained the related indemnification and tax consequences resulting from Globe Holdings' place of reformation.

Globe Holdings has no business operations of its own. The business is carried out through its non-insurance company non-debtor subsidiaries that are all incorporated under the US laws and operating in the US. All employees are in the US. The headquarters are also in the US.

In April 2017, Globe Holdings offered and issued USD 25,000,000 in aggregate nominal principal amount of 6.625% senior unsecured notes due in 2023 (referenced above as the Notes) governed by New York law.

In 2019, Globe Holdings recorded on its consolidated balance sheet a significant increase in liabilities. As a result, Globe Holdings worked with external professional advisors to undertake a formal strategic evaluation of its subsidiaries' businesses. In September 2020, Globe Holdings announced that it was informed its shares would be suspended from the NASDAQ Stock Market due to delinquencies in filing its 10-K. Thereafter, on November 6, 2020, its shares were delisted from the NASDAQ stock market.

An independent third party is actively marketing the sale of the corporate headquarters located in New York including the land, building, building improvements and contents including furniture and fixtures.

Despite these efforts to ease the financial stress, the culmination of incremental challenges consequently resulted in Globe Holdings being both cash flow and balance sheet insolvent.

Globe Holdings retained Cedar and Woods, its long-standing Cayman Islands counsel, to advise on restructuring alternatives. Upon consultations with Cayman counsel and its other

professionals, Globe Holdings ultimately determined that the most value accretive path for the Noteholders was to commence a scheme under Cayman Islands law, followed by a chapter 15 recognition proceeding in the United States, most notably to extend the maturity of the Notes and obtain the flexibility to pay the quarterly interest “in kind”.

Globe Holdings expeditiously secured the support of the majority of the Noteholders of its decision to delay interest payments and restructure the Notes through a formal proceeding. Thereafter, on August 31, 2021, about 57% of the Noteholders acceded to the Restructuring Support Agreement (RSA) governed by the New York law. The RSA memorialized the agreed-upon terms of the Note Restructuring. When Globe Holdings approached its largest Noteholders regarding the contemplated restructuring, their expectations were that any such restructuring would take place in the Cayman Islands, which is reflected in the RSA.

On July 4, 2023, the client, in accordance with the terms of the RSA, applied to the Cayman Court for permission to convene a single scheme meeting on the basis that the Noteholders, as the only Scheme Creditors, should constitute a single class of creditors for the purpose of voting on the Scheme.

On July 26, 2023 the Cayman Court entered a convening order (the Convening Order) on the papers, among other things, authorizing the client to convene a single Scheme Meeting for the purpose of considering and, through a majority vote, approving, with or without modification, the Scheme. The Scheme Meeting was held in the Cayman Islands at the offices of Cedar and Woods. Given the Covid-19 pandemic, Scheme Creditors were also afforded the convenience of observing the Scheme Meeting via Zoom and in person via a satellite location in New York. Following the Scheme Meeting, the chairman of the Scheme Meeting (presiding over the meeting in person) reported to the Cayman Court that the Scheme was overwhelmingly supported by the Noteholders, with 91.83% in number and 99.34% in value voting in favor of the Scheme. The Sanction Hearing was held, and an order sanctioning the Scheme (the Sanction Order), which was filed with the Cayman Islands Registrar of Companies the same day.

During all of this time, a class action litigation was in the US was brewing but has been filed yet.

Firstly, an analysis of whether Globe Holdings falls under Model Law should be performed. As it is a Cayman Islands registered company and a scheme has been arranged with the Cayman Islands Court, along with the fact that Cedar and Woods are seeking to apply for chapter 15 recognition in the United States, it would fall within the scope of Model Law as it is an inward bound request from the Cayman Islands to the United States for foreign recognition of a proceeding.

To further analyse Globe Holdings and whether the scheme would fall under Article 1 of the Model Law, the definition of a foreign proceeding should be considered to ensure it meets the criteria. The criteria for a proceeding to be considered foreign is listed below:

- A proceeding (including an interim proceeding);
- The proceeding is either judicial or administrative;
- The proceeding is collective in nature;
- The proceeding is in a foreign state;
- The proceeding is governed or conducted under insolvency law;
- The assets and affairs of the debtor are subject to control or supervision by a foreign court; and
- The proceeding is for the purpose of a reorganization or liquidation.

The Globe Holdings proceeding is considered to be a proceeding in a foreign state, being the Cayman Islands, and is being governed under insolvency law of the Cayman Islands and the assets are subject to control of supervision by a foreign court, again being the Cayman Islands court. Based on the case facts, the above criteria has been met and therefore is considered a foreign proceeding in the enacting state, being the United States.

Lastly, under Model Law, consideration regarding whether the foreign proceeding is administered by a foreign representative. The definition of a foreign representative is as follows:

- A person or body, including one appointed on an interim basis;
- Authorised in a foreign proceeding; and
- To administer the reorganisation or liquidation of the debtor's assets or affairs or to act as the representative of the foreign proceeding.

Based on the case facts presented, with Globe Holdings discussing with Cedar and Woods and their other professionals that a Scheme would be the best way forward, it can be inferred that a representative has been appointed to oversee the scheme. The representative would be tasked with administering the reorganization of Globe Holdings and could only be appointed if they were authorised to supervise schemes. Therefore, the definition above would be met regarding a foreign representative.

Based on the above, the proceedings can be considered under the scope of Article 1 of Model Law.

When considering whether the proceeding should be a foreign main or foreign non-main proceeding in the Cayman Islands, the Centre of Main Interest or COMI and the definition of Establishment need to be considered. COMI is considered under the UNICITRAL guide and provides guidelines on to determine where the entity's COMI is. Two key factors should be considered when determining COMI, which are:

1. The location where the central administration of the debtor takes place; and
2. Is readily ascertainable as such by creditors of the debtor.

Other considerations that should be taken into account are:

1. The location of the debtors books and records;
2. The location where financing was organised and authorised;
3. The location from where the cash management system was run;
4. Where the principal assets of the entity are found;
5. The location of the primary bank account of the debtor;
6. The location of the employees; and
7. The location where contracts for supply are organised;

Currently, Globe Holdings has no operations in the Cayman Islands. The assets of Globe Holdings sits in the United States, and their employees are all in the United States. Additionally, all contracts entered into would be through Globe Holdings' subsidiaries, which are based in the United States. Also, the senior unsecured notes issued by Globe Holdings are governed by New York law in the United States. Lastly, the headquarters of its underlying subsidiaries are based in the United States. There is an argument that Cayman Islands also could be considered the COMI as the books and records are held there, their main bank account is there, and the central

administration occurs in the Cayman Islands. But based on the case facts, there are more points that support the United States being the COMI, and therefore the US should be considered the COMI in this instance.

The definition of Establishment relates to foreign non-main proceedings. In order to determine whether the Cayman Islands or the United States falls under foreign non-main proceedings, the definition of Establishment must be considered. The definition for Establishment is any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. Currently, Globe Holdings is incorporated in the Cayman Islands and its registered office would therefore be in the Cayman Islands. Therefore, it would be considered non-transitory in nature and an establishment is in place in the Cayman Islands. Additionally, Cedar and Woods are the legal counsel to Globe Holdings in the Cayman Islands and therefore meet the requirement of economic activity being performed with human means. As such, a foreign non-main proceeding should occur in the Cayman Islands.

Based on the above case facts and assessment made, Chapter 15 proceedings should commence in order to gain recognition of the foreign non-main proceeding in the Cayman Islands, which is the Scheme. This would allow the scheme supervisor to oversee the assets of the debtor in the United States and would further assist in providing relief.

Article 15 prescribes the following requirements in order to gain recognition of a foreign proceeding by the foreign representative:

1. A certified copy of the Cayman Islands court convening order that authorises Globe Holdings to convene a single Scheme Meeting to consider and approve through majority vote, the extension of the maturity of the senior unsecured notes and to pay the quarterly interest in kind; or
2. A certificate from the Cayman Islands court affirming the existence of the proceeding and of the appointment of the foreign representative; or
3. In the absence of the two above points, any other evidence acceptable to the court of the existence of the proceeding in the Cayman Islands and the appointment of the foreign representative.

Also, the application for recognition must be accompanied by a statement identifying all foreign proceedings in respect of Globe Holdings that are known to the foreign representative. The foreign representative should also include in the recognition application the restructuring support agreement and the engagement letter retaining Cedar and Woods as the legal counsel to advise Globe Holdings throughout the Scheme process.

In terms of seeking relief, Article 19, 20 and 21 of the Model Law should be considered. Under Article 19, urgent interim relief can be provided to protect the assets of Globe Holdings at the time of filing the recognition application, until the application is decided on. Relief under Article 19 include a stay of execution against Globe Holdings assets, and/or entrusting the administration or realisation of all or part of Globe Holdings assets located in the United States to the foreign representative or another person designated by the court, in order to preserve the value of the assets. Article 19 applies to both foreign main and non-main proceedings. Therefore, temporary relief can be sought after for Globe Holdings under Article 19, if required. Under Article 20, automatic mandatory relief can be given if the recognised foreign proceeding qualifies as a foreign main proceeding. Due to the fact that the Cayman Islands proceeding is considered as a foreign non-

main proceeding, Article 20 does not apply and automatic mandatory relief cannot be given. Therefore Article 21 of the Model Law should be considered in order to gain relief. Under Article 21, at the request of the foreign representative, appropriate relief can be granted to protect the assets of Globe Holdings or to protect the interests of the creditors. The relief that can be granted include the following:

- Staying the commencement or continuation of individual actions or individual proceedings concerning Globe Holdings assets, rights, obligations or liabilities, to the extent that they have not been automatically stayed under Article 20;
- Staying execution against Globe Holdings assets to the extent it has not been stayed under Article 20;
- Suspending the right to transfer, encumber or otherwise dispose of any assets of Globe Holdings to the extent this right has not been automatically suspended under Article 20;
- Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning Globe Holdings assets, affairs, rights, obligations, or liabilities;
- Entrusting the administration or realisation of all or part of Globe Holdings assets in the United States to the foreign representative, being Cedar and Woods, or another person designated by the court;
- Extending any interim relief granted pursuant to Article 19; and
- Granting any additional relief that may be available to a domestic liquidator or office holder under the laws of the United States.

Based on the above options for relief, the foreign representative should seek relief under Article 19 as there is an impending class action law suit that may be filed, which could result in substantial claims, which in turn could strip the assets away from Globe Holdings. By seeking interim relief, the assets of Globe Holdings will be protected until a decision has been made on the recognition application. Once a decision has been made on the recognition application, relief under Article 21 should be filed to further protect the assets of the company and preserve value for the senior unsecured note holders and any other unsecured creditors of Globe Holdings.

The essay should contain definitions of terms used, with respective references to MLCBI provisions and/or appropriate sources; discussion on the rebuttable presumption of the COMI per Article 16(3) MLCBI and alternative courses of action; conclusive remarks also referencing to Art. 22 and 6 MLCBI....

*** End of Assessment ***

Marks awarded: 31 out of 50